STATE OF MICHIGAN

IN THE SUPREME COURT

CHARLES C. STARKS, JR.,

Plaintiff/Appellant,

Vs.

Supreme Court No. 130283
Court of Appeals No. 256401
Lower Court No. 01-5581-CZ

MICHIGAN WELDING SPECIALISTS, INC., a Michigan corporation, AUGUST F. PITONYAK, an individual,

Defendant/Appellee,

/

JOHN R. TATONE & ASSOCIATES, P.L.C.
BY: JOHN R. TATONE (P55825)
Attorneys for Plaintiffs
33830 Harper Avenue
Clinton Township, MI 48035
(586) 415-1200

ROBERT S. HUTH, JR. (P42531)
Attorney for Michigan Welding Specialists and August F. Pitonyak
19500 Hall Road, #100
Clinton Township, MI 48038
586-412-4900

/

130283

PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

On April 7, 2006, this Court issued an Order directing the parties in this matter to file a supplemental brief within 56 days addressing the following issues:

> (1) Whether Defendant is liable under the 5th narrow exception to the traditional rule of a corporation purchaser's non-liability of the purchased corporations liabilities, when the purchase is accomplished by an exchange of cash for assets- that is "where the transferee corporation was a mere continuation or re-incarnation of the whole corporation." Foster vs. Cone-Blanchard, 460 Mich 696, 702 (1999); (2) Whether that 5th stated narrow exception discussed in Foster is precluded when there is a tertiary relationship (Id. p 704)

between the purchasing entity and the purchased entity; (3) Whether the Continuity of Enterprise Doctrine as discussed in Foster has application beyond product liability cases; and if so, (4) the applicability, under the facts of this case, of the Continuity of Enterprise Doctrine.

II. LEGAL DISCUSSION

A. The Continuity of Enterprise Doctrine.

In Turner vs. Bituminous Casualty, 397 Mich 406, 244 NW2d 873 (1976), this Court expressed the "traditional rule" that a corporation which purchases all of the assets of another corporation is not, without more, responsible for the debts and liabilities of the selling corporation, unless (1) the purchasing corporation expressly or impliedly assumes the predecessor corporation's liability; (2) the transaction amounts to a consolidation or merger of the buying and selling corporation; (3) the sale was fraudulent as to creditors; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transfer were not provided for; or (5) where the transferee corporation is a mere continuation or reincarnation of the old corporation. (Citations omitted)

Id. at 417 footnote 3. The Court in Turner expanded the "mere continuation" exception stated above by adopting guidelines set forth in Shannon vs. Samuel Langston Co., 379 F. supp. 797 (W. D. Mich 1974) for determining whether there is successor liability when the following are present:

1. There was a basic continuity of the enterprise of the seller corporation, including retention of key personnel, assets, and general business operations;

2. The seller corporation ceased ordinary business operations, liquidated, and dissolved as soon after as legally and practically possible.

3. The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation and;

4. The purchasing corporation held itself out to the world as the effect continuation of the seller corporation. Id. at 430[1]

This rule has become known as the "Continuity of Enterprise Doctrine." Subsequently, the Court of Appeals in Haney vs. Bendicks Corp. 88 Mich App 747; 279 NW2d 544 (1979), applied the rule announced in Turner, affirming the Trial Court's ruling in that case that the Defendant met the test to be liable as a successor corporation under the continuity of the enterprise doctrine even though the Defendant had a "tertiary" relationship to the predecessor corporation. Foster at 704.

In Foster, Supra this Court clarified the continuity of enterprise doctrine by requiring the predecessor corporation to be no longer viable and capable of being sued for the transferee corporation to be liable. Foster at 706. The concern expressed by this Court in Foster regarding the tertiary relationship of the parties involved in that case was resolved by utilizing the relationship as one factor in determining the purchaser was a successor for liability purposes. Id. at 704,705. In Craig vs. Oakwood Hospital, 471 Mich 67 (2004) this Court confirmed the Foster holding that the availability of relief for a Plaintiff against the selling corporation will bar the imposition of successor liability. Craig at 99.

Various Federal and State Courts have applied the continuity of enterprise doctrine in areas beyond product liability cases; including: labor, employment, environmental, racketeer influenced and corruption organizations act cases and as tax matters. The underlying policy concerns and logic utilized in the Turner, Haney and Foster cases apply equally to non-product liability.

B. The Policy and Logic of Turner.

In Turner, Supra, this Court noted that the "traditional rule" reflects the general policy of the corporation contractual world that liability adhere to and follow the corporate entity. Id. at 703. However, as the Turner Court quoted from the opinion in CYR vs. B Offen & Co., Inc. 501 F. 2d.

[1] Although the Court discussed utilizing the first, third and fourth criteria quoted in the Shannon case, it appears the Court added the fourth criteria when applying the law to the facts in that case. Turner at 429-430.

1145 (CA 1 1974), "but in the most real sense it is [the acquiring corporation] profiting from a [sic] exploiting all of the accumulated good will which the products have earned, both in outward representations of continuity and internal adherence to the same line of equipment." Turner at 425, (Citing CYR at 1153, 1154). This Court also emphasized the statements of Judge Fox in Shannon who focused on the "fairness inherent in requiring the company benefiting from continuing the business of the former company to bear some of the burdens as well." Id. at 425 citing Shannon at 802-803. The Turner Court noted that the relationship of the predecessor and successor corporations at issue in that case were not strangers unless one honors "form over substance." Id. at 426. The Turner Court concluded, "The natural purpose of New Sheridan was to incorporate Old Sheridan into its system with as much the same structure and operation as possible. Continuity is the purpose, continuity is the watch word, continuity is the fact." Id. at 426.

The Turner Court analyzed the Defendant's argument of harm to the market place in cash for assets transactions stating that if the transaction has been in the nature of a merger, "there would have been no question that Harris-Intertype would be liable." Id. at 427. Even in 1976, the Court noted that corporate mergers continued to occur, even in the face of such contingent obligations. Id.. Thus, the Court reasoned, it has not been demonstrated that the possibility of liability would have a different effect on other forms of corporate acquisition. Id.

The Court also discussed the Defendant's argument of unfair "surprise" to the successor corporation that could not contemplate the resulting liability at the time of the purchase. Finding that argument to be without merit, the Turner Court reasoned:

> "once corporations considering such transactions become aware of the possibility of successor products liability, it can make suitable preparations. Whether this takes the form of products liability insurance, indemnification agreements or of escrow accounts, or even a deduction from the purchase price is a matter to be considered between the parties. Negotiations may be complex, but, with

> familiarity, they should become a normal part of business transactions." Id. at 428.

Since Turner, in 1976, the economy of Michigan has continued to grow; it is obvious that the concern that such a rule applied in the corporate world would "chill the market place" is without evidence. Welco Industries vs. Applied Companies, 67 Ohio St. 3d 344, 349 (1993).

As Judge Fox stated in Shannon, Supra, the Defendant successor received all of the benefits and advantages of a going concern, including expertise, reputation, established customers and so forth. Public policy required that Defendant successor, having received these benefits, should also assume the cost which all other going concerns must ordinarily bear. Turner at 414. Judge Fox further commented, "The solvent natural person cannot avoid his liability for injuries caused by him simply by changing the form of his property or by changing his name or by changing the numbers on his bank accounts. Similarly, solvent corporations, going concerns, should not be permitted to discharge their liabilities to injured persons simply by shuffling paper and manipulating corporate entities", Turner at 414, 415 (citing Shannon at 802, 803).

In fact, the only difference between the mere continuation factors and those of the "defacto merger exception" is a continuity of the same shareholders. As our long history of corporate law reveals, the law continually emphasizes that corporations are to be treated as separate entities, apart from their shareholders, Klager vs. Robert Meyer Co., 415, Mich 402, 329 NW2d 721 (1982). As such, why should the ownership of the corporation be an essential element of successor liability? The requirement that the injured Plaintiff have no further place to turn for relief, except for the second corporation, also limits application of this rule in the market place Foster, Supra. The continuity of enterprise doctrine is limited in its application since there must be a transfer of assets. As stated by Philip I. Blumberg, The Continuity of the Enterprise Doctrine: Corporation Successorship in United States Law, 10 Fla. J. Int'l L. 365 at 372. "thus, even where an alleged

successor has the same shareholders, same name, and conducts a related business, there can be no successor liability where there has been no transfer of the predecessor's assets or continuation of its manufacturing activity. The line of cases analyzing the continuity of enterprise doctrine have focused on fairness and responsibility while weighing the successor corporations position, to justify the continued expansion of the doctrine.

C. The Continuity of Enterprise Doctrine is not precluded when there is a tertiary relationship.

This Court in Foster noted that the "tertiary nature" between the predecessor corporation and Defendant is a factor it "Foster at 704 citing Haney, Supra. The Foster Court continued by stating "in the appropriate case a tertiary successor might be liable..." Foster at 705.

In an unpublished opinion, the Court of Appeals reversed a trial courts decision finding that successor liability under a continuity of enterprise theory may occur even though the successor corporation purchased the assets from the predecessors secured creditor. State Farm vs. Pitney Bowes, 1999 Mich App Lexis 1566. Thus, the indirect acquisition of the assets of a corporation creating a tertiary relationship does not preclude application of the continuity of enterprise doctrine.

D. The Continuity of Enterprise Doctrine as discussed in Foster has application beyond the products liability realm.

As discussed in his Article, Supra, Blumberg identifies various Federal and State applications of the continuity of enterprise doctrine beyond products liability cases, such as cases under the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA) 42 USC 9601-9675 (1994), and under the Resource Conservation and Recovery Act of 1976 (RCRA) 42 USC 6901 (1994). Blumberg, Supra. According to Blumberg, "40 years ago, the NRLB created the 'integrated enterprise' standard for determining when separate concerns would be

treated as a 'single employer' under the NRLB regulatory program for purposes such as jurisdiction, determination of the bargaining unit, existence of a duty to bargain and secondary boycotts. Application of the standard depends on 4 standards, (1) interrelation of operations, (2) centralized control of labor relations, (3) common management and (4) common ownership or financial control. While none of these factors is essential, it is plain that the integrated operations and centralized control of the labor relation are the most important. After its formulation by the NRLB the doctrine was readily accepted by the Supreme Court and it has governed labor law ever since. Blumberg, Supra, at 398-399 (citing Radio & Television Broadcast Technicians Local Union vs. Broadcast Service of Mobile, Inc., 380 US 255 (1965))(per curium). The expanded continuity of enterprise doctrine has also been useful in finding successorship liability under the anti-discrimination statutes Id. (citing Upholsters Int'l Union Pension Fund vs. Artistic Furniture of Pontiac, 920 F. 2d 1323 (7th cir. 1990)).

As Blumberg indicates, the Court of Appeals for the 9th Circuit in Criswell vs. Delta Airlines, 868 F. 2d at 1094, added two additional elements, when applying a version of the continuity of enterprise doctrine; (1) notice on part of the successor of the predecessor's obligations and (2) the inability of the Plaintiffs to obtain relief directly from the predecessor. Blumberg at 403.

Finally, Blumberg points out that the continuity of enterprise doctrine has been consistently applied by Courts in tax law and anti-trust litigation. Id. at 404.

As stated above, the continuity of enterprise doctrine has been applied in various forms and applications beyond product liability cases. The same underlying policies supporting the doctrine's application in product liability cases provides support for its application in non-product liability cases.

E. Special considerations.

Other special considerations mentioned in Blumberg's article could be applied by this Court to further limit the application of the continuity of enterprise doctrine to alleviate fairness concerns two special considerations that could be factored include:

(1) The knowledge of the liability/contingency by the successor corporation prior to the purchase of the assets for cash.

(2) The time the successor corporation has been in existence and/or the purpose of a successor corporation prior to purchasing the assets of the predecessor corporation.

For example, when a new corporation is created, having no equipment or personnel and acquires a substantial portion of personnel and equipment from a predecessor corporation, there should be little doubt that the successor corporation may face successor liability under the continuity of enterprise doctrine, regardless of ownership of the shares of stock.

F. The fifth stated narrow exception discussed in Foster, the Continuity of Enterprise Doctrine applies in this case.

This business tort action is a compelling case in which to apply the continuity of enterprise doctrine. As explained in great lengths within the application for leave to appeal, Michigan Welding Specialties, Inc. ("Michigan Welding") is nothing more than a reincarnation and continuation of Accurate Welding II, Inc. ("Accurate II"). Larry Ulry ("Ulry"), 50% shareholder of Accurate II purchased a majority of the assets of Accurate II for himself by way of a newly formed corporation, Dualtech, Inc. ("Dualtech") to the exclusion of the Plaintiff, Charles Starks, Jr. ("Starks"), the other 50% owner of Accurate II. Dualtech continued with the same employees, location, management, equipment, one of the shareholders (Ulry), customers,

conducting the same service and general business operations as Accurate Welding II, Inc. After arbitration, a judgment was entered against Ulry and Dualtech, Inc. for $435,000.00 [2]

On May 25, 2001 Dualtech claims that it ceased its ordinary business operations and surrendered its "tangible assets" to National City Bank. **(Exhibit to application 13).** Thus, the second factor of the continuity of enterprise doctrine is established. On the very same day, Michigan Welding Specialists, Inc. ("Michigan Welding") began operations at the same address utilizing the same management inventory, equipment, personnel, customer list, fax number and telephone number of Dualtech. **(Exhibits to application 7,14,15,17,18,28,29).** Therefore the first factor is clearly met. Michigan Welding assumed the liability of Dualtech only as to creditors essential for its continuation. Pitonyak, President of Michigan Welding, has testified that he paid on behalf of Michigan Welding an Electric bill of Dualtech. **(Exhibits to application 7).** In addition, Michigan Welding continued to pay Blue Cross/Blue Shield of Michigan for the health care policies of the employees of Dualtech and the Workers Compensation Insurance of Dualtech, **(Exhibits to application 35, 36).** As such, the third factor of assuming "necessary" obligations is met. In fact, Michigan Welding was in business for nearly a month before sending notices to customers of Dualtech that it was acquiring Dualtech and was going to provide the same service with the same employees that customers have been accustomed to. **(Exhibit to application 15).**

The day to day operations of Michigan Welding were and continued to be conducted by the same management of Dualtech. In fact, the bank document from Citizen State Bank dated June 19, 2001 lists Deborah Ulry (Ulry's wife) as a signer and officer of Michigan Welding. [3]

---

[2] The arbitrators did not state the exact theory of liability, however, the underlying Complaint sounded mostly in tort. **Exhibit 40- Complaint, Exhibit 41-Arbitration award and Exhibit 42- Judgment.**

[3] Once this information was disclosed to Defendant's counsel, Defendant acquired a letter from Citizens State Bank indicating an error in listing Deborah Ulry as an officer of Michigan Welding Specialties, Inc. However, it is

(Exhibit to application 13). Ulry is listed as "officer/welder" on the payroll records of Michigan Welding. **(Exhibit to application 18).**

Michigan Welding mailed the letter dated June 22, 2001 to Dualtech customers which states in relevant part, "we are getting closer everyday to completing this transaction, and in the interim we have signed an operating agreement, allowing us to continue to operate the business. (emphasis added)...presently we are continuing the same services and pricing that Dualtech had in place" **(Exhibit to application 15).** That letter reflects Michigan Welding's belief that it could acquire the assets of Dualtech with the assistance of the Ulrys, in a manner that would not involve any interruption of work or the traditional costs associated with opening a new business. It is also noteworthy that Michigan Welding's President, August F. Pitonyak ("Pitonyak") was Dualtech's landlord, friend and business partner of Ulry.

In fact, correspondence from Michigan Welding (Deborah Ulry) to its liability insurance company and its workers compensation carrier indicate that it was one in the same corporation as Dualtech **(Exhibit to application 36, 37).** Obviously, if Michigan Welding was a complete stranger and a brand new company, it would have acquired its own Chrysler vendor ID number, its own Blue Cross/Blue Shield policy, its own workers compensation policy, its own customers, its own material and inventory. Therefore, the forth criteria of the continuity of enterprise doctrine as stated in Foster has been met, since Michigan Welding held itself out as the same business as Dualtech.

Under the doctrines announced by Foster, Supra, the "tertiary" relationship - - Michigan Welding technically purchased the physical assets from the bank - - is only one factor to be

---

Appellants position that a fact finder should determine whether the letter from Citizens State Bank who stands to loose its collateral to Michigan Welding Specialist, Inc. should be believed.

considered in ascertaining successor liability, and is not dispositive of the issue. Foster at 704,705;. State Farm, Supra.

L & D Renaissance Properties, LLC ("L & D") is the owner of 31125 Fraser, Michigan the location of Dualtech and landlord of Dualtech. Pitonyak was a personal guarantor of L & D after purchasing an interest in L & D in December 2000. There are no other tenants in the building. L & D Renaissance Properties, LLC also guaranteed the debt of Dualtech. **(Exhibit to application 4)** Therefore, Pitonyak indirectly guaranteed the debt of Dualtech, 5 months before Dualtech became Michigan Welding. As such, Pitonyak had a greater stake in the survival of Dualtech by reincarnation than the ordinary stockholder who would merely loose specific capital investment, but have no personal liability.

Another consideration is that National City Bank never actually shut the business down or took physical possession of the assets. Instead, on May 25, 2001 Michigan Welding took over the business[4]. This enabled a seamless transfer between the two corporations whereby only a sign need be changed on the front of the building. Also, there was a direct delivery of certain assets to Michigan Welding from Dualtech without any consideration, such as the phone number, fax number, customer lists, and Daimler Chrysler vendor ID number, and other "good will" of Dualtech. Prior to taking over Dualtech, Pitonyak had a meeting with the Dualtech staff where they were advised that he would be "taking over the business" **(Exhibit to application 12)**.

It is also relevant that prior to the surrender of physical assets by way of letter, Dualtech had not been delinquent on any payments owed to the bank. In fact, Ulry had given himself a 50% raise within four months prior to Dualtech sending its surrender letter. Additionally,

[4] National City eventually entered into a lease with Michigan Welding Specialists, Inc. for the use of the equipment. Months later, Michigan Welding Specialists, Inc. purchased the assets of Dualtech for the amount owed to National City Bank.

Pitonyak had actual knowledge of Dualtech's obligation to Starks before the purchase of assets. **Exhibit 7.**

Essentially Michigan Welding refinanced the debt owed by Dualtech to National City Bank and Lakeside Bank. The purchase price was far less than fair market value. **(Exhibit to application 30)** Simply put, Michigan Welding Specialist and Dualtech are not the strangers that the technical paperwork implies. Given all of the above, this transfer of assets for cash was anything but an arm's length transaction, despite the illusion of National City Bank's involvement.

Finally, as announced in Foster, Starks, the injured Plaintiff has no other recourse, since Ulry conveniently declared bankruptcy and has discharged his personal obligation. The same underlying principals determined by this Court to protect injured Plaintiffs in Turner clearly apply to this case.

III. CONCLUSION

As stated in various ways by the writers in the materials cited above, the successor corporation in some transactions receive the special benefits of a going concern corporation and therefore, out of sense of fairness, should also bear more of the burdens. The successor corporation in this case enjoyed more than a natural person would enjoy under the same set of circumstances. As Judge Fox pointed out in Shannon, a purchase of a company by way of stock as opposed to cash-for-assets somehow creates a difference for liability purposes without explanation. As also noted, the successor corporation has a unique ability to absorb the risks of the predecessor corporation more easily than the injured Plaintiff. Corporations in such cases can utilize indemnification agreements, reductions in sale price, personal guarantees, etc., which insulate it from the risk which an injured Plaintiff does not have the ability to do. Most

importantly, the Foster decision made it clear that the doctrine only applies when the injured Plaintiff has no other remedy since the predecessor corporation is unavailable for recourse.

The reasoning against application of the Continuity of Enterprise doctrine has been determined to be without merit and this Court should affirm its limited application, limited by the factors and elements as discussed above. One concern is that expanding successor liability by applying the continuity of the enterprise doctrine would chill the market place to prevent the free alienability of corporate assets. As discussed throughout the cases cited above, mergers with stock were common in 1976 and are still common today. In such cases, liability attaches under the "traditional rule" of successor liability. Thus, the creation of such liability has not, in the last thirty years or more, persuaded corporations from merging by way of stock purchases. Therefore, there is no indication that the very limited application of the continuity of enterprise doctrine has any effect on the market place. The market place has and will continue to protect the successor corporation through contractual provisions such as indemnification, personal guarantees and/or adjustments of price among other tools at the disposal of the successor corporation.

Since the underlying public policy, favoring fairness and the ability of the successor corporation to deal with contingencies, effects injured Plaintiffs the same way in non-product liability cases, there is no reason not to apply the continuity of enterprise doctrine in non-product liability cases. Again, the same focus of responsibility for causing the harm to the plaintiff should prevent the same entity from thwarting that responsibility by the "shuffling of paperwork".

The sole purpose of Michigan Welding was to purchase and operate Dualtech as a going concern. Considering Pitonyak's relationship to Dualtech financially as well his business relationship with the sole shareholder of Dualtech, Lawrence Ulry, and the continued

employment of both Ulrys at Michigan Welding, application of the continuity of the enterprise doctrine is especially appropriate in this case. A loop hole and technicality in the law has been exploited by Dualtech with the assistance of Michigan Welding to avoid unwanted liability rather than a legitimate business purpose. Unfortunately, the focus of the "traditional rule" of non-liability with exceptions that focus on ownership of the company instead of the corporation's autonomy allowed Dualtech to literally flip a sign to shirk responsibility for its past actions. The most telling fact in this case is that all of the parties had actual knowledge of Mr. Stark's judgment against Dualtech and Ulry. Dualtech was not in default under its financing agreements with the banks and the transaction between Dualtech and Michigan Welding was specifically structured by Ulry to escape liability under the judgment.

RELIEF REQUESTED

The appellant requests this Honorable Court grant the Appellant's application for leave to appeal and reverse the Michigan Court of Appeals decision, finding successor liability as to Michigan Welding Specialists, Inc., or, grant that relief peremptorily, in lieu of granting leave, and award costs to Plaintiff.

Respectfully Submitted,

JOHN R. TATONE & ASSOCIATES, P.LC.

BY: JOHN R. TATONE P55825
Attorney for Appellant Charles C. Starks, Jr.